National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 27, 1996

TO: Peter W. Hirsch, Regional Director, Region 4

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: ILA and its Local 1291 (Holt Cargo), Cases 4-CC-2124-1,-2 and 4-CD-942-1,-2, International Longshoremen's Association (Holt Cargo), Cases 4-CC-2124-1, -2 and 4-CD-942-1. -2

560-2575-6713, 560-7540-8001-1750, 560-7540-8020-5050, 560-7580-4033-0100, 584-3740-5900

These cases were submitted for advice as to whether the Union violated Section 8(b)(4)(ii)(B) and/or (D) by grieving an alleged violation of a contractual no-subcontracting clause.

FACTS

Holt Cargo Systems ("Holt") is a stevedoring company which, among other things, maintains and repairs shipping containers and chassis under contracts with various containerized cargo carriers, including Maersk Container Service Company ("Maersk"). Holt's employees engaged in maintenance and repair ("M&R") work are represented by Machinists Local 724. Maersk is a member of the Philadelphia Marine Trade Association (PMTA), a multi-employer association, and thus is party to a multi-employer Master Contract with the ILA. Maersk, like many other carriers, does not directly employ longshoremen to perform bargaining unit work on its containers and chassis, but rather subcontracts M&R work to stevedores like Holt.[(1)] Holt is not a member of the PMTA; however, it is a "me too" signatory of the Master Contract.

Section 10(A) of the Master Contract provides, in pertinent part:

It is agreed that the jurisdiction of the ILA shall cover the maintenance of containers (which term includes chassis) at waterfront container facilities, and/or off-pier premises used for servicing and repair of containers and chassis, covered by this agreement, by ILA Maintenance in accordance with the Containerization Agreement.

The Containerization Agreement provides, in pertinent part:

Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes but is not limited to ... the maintenance and repair of containers.

In 1989, Holt moved its operations across the Delaware River from Gloucester City, New Jersey to the Packer Avenue Marine Terminal in Philadelphia, Pennsylvania. In a 1992 Section 10(k) decision, the Board awarded the M&R work at Packer Avenue to Holt's employees represented by the IAM, rather than to Holt employees represented by the ILA.[(2)]

In ILA Local 1291 (Holt Cargo Systems),[(3)]

the Board further held that Local 1291 (the "Union" and also Respondent herein) violated Section 8(b)(4)(ii)(B) by filing and processing a grievance under the jurisdictional provisions set forth above against four PMTA-ILA signatory carriers including Maersk, which had continued to subcontract M&R work to Holt after Holt's 1989 move to the Packer Avenue Terminal. The Board affirmed the ALJ's findings which, *inter alia*, rejected Local 1291's work preservation defense on the basis that Local

1291-represented employees had never previously maintained or repaired the carriers' equipment, with one brief exception many years before.

However in 1991, prior to issuance of those Board decisions, Maersk ceased subcontracting M&R work to Holt. Instead, Maersk contracted with Delaware River Stevedores ("DRS") located at the Tioga Marine Terminal in Philadelphia. DRS is a member of PMTA, is signatory to the ILA Master Contract and employed Local 1291-represented longshoremen to perform unit M&R work. After four years, in December 1995, Maersk switched back to Holt at the Packer Avenue Terminal to perform its M&R work. Holt assigned the work to its IAM-represented employees as it had done in the past.

On February 16, 1996, Local 1291 filed a grievance against Maersk alleging that the carrier stopped using ILA-represented labor in violation of Section 10(A) and the jurisdictional provision of the Master Contract and Containerization Agreement, respectively. According to Holt's Director of Stevedoring, a Local 1291 official told him that the Respondent pursued the grievance because, "we think we should keep the work."[(4)]

The grievance has gone through the first two steps of the grievance procedure, without resolution. To date, the Union has not taken any concerted action in support of its position, other than the filing and maintenance of the grievance.

ACTION

We conclude that by filing a grievance raising a colorable work preservation claim against the Employer, the Union did not coerce Maersk in furtherance of a proscribed object within the meaning of Section 8(b)(4)(ii)(B). We further conclude that by filing and pursuing an arguably meritorious grievance to enforce a facially lawful no-subcontracting clause, the Union did not make a claim for the M&R work within the meaning of Section 8(b)(4)(ii)(D). Accordingly, the instant charges should be dismissed in their entirety, absent withdrawal.

A. Section 8(b)(4)(ii)(B)

Section 8(b)(4)(ii)(B) protects neutral employers from union acts of coercion having an object of forcing them to cease doing business with another employer with which the union has a primary dispute.[(5)]

The Board has held that a union violates Section 8(b)(4) where it files a grievance interpreting a facially lawful contract clause in such a manner as to transform it into one violative of Section 8(e).[(6)]

Here, Charging Party Holt contends that the Union's grievance would turn Section 10(A) and the jurisdiction provision of the Containerization Agreement, both facially valid, into hot cargo clauses by requiring Maersk to cease doing business with Holt in violation of Section 8(b)(4)(ii)(B). The Union, however, posits a work preservation defense.

In NLRB v. International Longshoremen's Association (ILA II), the Supreme Court noted that a lawful work preservation agreement must (1) have as its objective the preservation of work traditionally performed by bargaining unit employees represented by the union, rather than some secondary goal; and (2) be directed at work which the contracting employer has the power to assign to employees.[(7)]

Under the latter "right of control" test, the Board will infer that if the employer against which the union takes action has no power to assign the disputed work, then the union's object must logically be to influence a neutral employer which does have that power.[(8)]

Thus, a lawful work preservation agreement depends on whether, under all the surrounding circumstances, the union's objective is the preservation of bargaining unit work or whether the agreement was tactically calculated to satisfy union objectives elsewhere.[(9)]

Of course, work preservation clauses may be lawful despite their incidental effect of limiting the group of persons with which

the signatory employer may do business.[(10)]

Here, ILA-represented longshoremen had been performing M&R work under DRS' contract with Maersk for over four years, prior to Maersk again awarding the contract for its M&R work to Holt. By canceling the DRS subcontract to perform M&R work at Tioga Marine Terminal, Maersk effectively removed unit work, transferring it instead to Holt's IAM-represented employees at Packer Avenue. Thus, as to the first part of a lawful work preservation defense, the grievance clearly had the object of preserving work which bargaining unit members had traditionally and regularly performed. Secondly, as the Court and the Board noted in the ILA cases, carriers like Maersk generally have the right to control the assignment of work since, by virtue of their ownership and/or long-term leasehold interest in the containers, they have the authority to prescribe the conditions of the containers' release to subcontractors.[(11)]

The Court of Appeals for the District of Columbia very cogently described the impact of the carriers' control in its ILA I decision: when faced with ILA sanctions for violating the Rules on Containers, the carriers limited their liability simply by refusing to supply truckers with containers the carriers owned or leased.[(12)]

Here, Maersk's control over the work is even more direct, for Maersk has the sole authority to choose a subcontractor. Thereby, Maersk can determine whether ILA- or non-ILA-represented labor will perform M&R work on its containers and chassis.[(13)]

As Judge J. Skelley Wright opined in the D.C. Circuit ILA I opinion, above, "[i]t is difficult to imagine a more forceful demonstration of control."[(14)]

The Board's decision in Longshoremen Local 1291 (Holt Cargo Systems), above, does not affect our conclusion. In that case, the Board rejected the ILA's work preservation defense, and thus premised the Section 8(b)(4)(ii)(B) violation on the fact that Union-represented employees had never up to that point performed M&R work for Maersk. Consequently, the Board concluded that the Union had no bargaining unit work to preserve.[(15)]

Here, of course, ILA-represented longshoremen performed the disputed M&R work for Maersk for over four years at DRS. As a result, Local 1291 clearly has an interest in retaining that unit work. The fact that the Union has never represented Holt's longshoremen and thus has no work to preserve at Holt has no bearing on our analysis. In ILA I, the Supreme Court rejected a Board holding that the ILA's Rules on Containers necessarily would have resulted in the acquisition of Teamsters-represented non-unit trucking and warehousing duties after the advent of containerization, rather than the protection of traditional bargaining unit work. In so concluding, the Court criticized the Board's failure to properly identify the work which the union attempted to protect, as that failure reflected a "fundamental misconception of the work preservation doctrine."[(16)]

Thus, the Court directed the Board upon remand to:

focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.[(17)]

Here, the proper focus needs to be whether the Master Contract protects bargaining unit work at DRS as it existed prior to the change in stevedores, rather than the work at Holt after "the innovation." As set forth above, it is uncontroverted that ILA-represented employees performed bargaining unit work for DRS at Tioga Marine Terminal for over four years prior to Maersk's switch to Holt. Thus, inasmuch as the Union actually performed the work in the past, the fact that the IAM (rather than the ILA) represents Holt's employees at Packer Avenue -- a status which Local 1291 does not attempt to dislodge -- is irrelevant to the Union's goals of preserving traditional work in its own bargaining unit.

Moreover, the Board has long held that good faith prosecution of a colorable contract claim does not constitute coercion within the meaning of Section 8(b)(4)(ii).[(18)]

"[W]hen, as here, a respondent pursues its legal remedies for an arguably meritorious claim under a properly negotiated collective-bargaining agreement and the record fails to disclose extrinsic evidence of threats, restraint, or coercion of the employer, we are unable to conclude that it has done more than its status as employee representative authorizes." (19)

Further, in Longshoremen ILWU Local 7 (Georgia-Pacific), (20)

the Board concluded that the validity of a grievance-arbitration procedure should be determined according to the principles of Bill Johnson's Restaurants v. NLRB, in which the Supreme Court held that the Board could enjoin a lawsuit only if it is without reasonable basis in fact or law (21)

or if it is for an illegal objective. (22)

As the Board held in Long Elevator, a grievance has an "illegal objective" within the meaning of Bill Johnson's footnote 5 if the "grievance ... is predicated on a reading of ... the collective bargaining agreement that would convert it into a de facto hot cargo provision, in violation of Section 8(e)." (23)

As set forth above, the Union's grievance presents a colorable contract claim and a valid work preservation defense sanctioned under Section 8(e). Accordingly, we conclude that by filing and pursuing the grievance through arbitration, the Union did not engage in coercive conduct for an unlawful object within the meaning of Section 8(b)(4)(ii)(B).

B. Section 8(b)(4)(ii)(D)

A jurisdictional dispute arises within the meaning of Sections 8(b)(4)(D) and 10(k) of the Act when an employer is "an obviously neutral party thrust into a work dispute that it did not cause." (24)

In contrast, the Board will not find a jurisdictional dispute where the employer has created the dispute itself by transferring unit work away from employees represented by a union, in breach of a bargaining agreement with that union. (25)

In Wesco, the Board held that the UFCW's grievance against Safeway alleging that it subcontracted unit work to Wesco in violation of a contractual no-subcontracting clause did not state a "claim" for the disputed work within the meaning of Section 8(b)(4)(D). Rather, the Board concluded that the terms of the collective bargaining agreement would resolve the dispute, prompting it to decline jurisdiction for fear of becoming "the arbiter of almost every subcontracting dispute." (26)

Thus, the Board will not invoke Section 8(b)(4)(D) "to arbitrate disputes between an employer and a union, particularly regarding the union's 'attempt to retrieve the jobs' of employees the employer chose to supplant by reallocating their work to others." (27)

Following Wesco, we conclude that the ILA did not "claim" the M&R work, but rather sought merely to enforce the Employer's arguable contractual obligations. As opposed to the previous cases involving these parties, the ILA does not insist that it represents Holt's Packer Avenue employees. Rather, it claims the disputed work only if the Master Contract precludes Maersk from subcontracting unit work to a non-ILA stevedore. Thus, Maersk, like the employer in Wesco, created this dispute by subcontracting unit work arguably in violation of its agreement with the ILA. Accordingly, since Maersk is not an innocent employer caught between the conflicting demands of two unions, Section 8(b)(4)(D) is not implicated. (28)

In sum, we conclude that the Union did not coerce Maersk in furtherance of a proscribed object within the meaning of Section 8(b)(4)(ii)(B) solely by raising in a grievance against the Employer a colorable argument to reclaim lost bargaining unit work. We further conclude that by filing and pursuing an arguably meritorious grievance to enforce a facially lawful no-subcontracting clause, the Union did not make a claim for the work within the meaning of Section 8(b)(4)(ii)(D). Accordingly, the instant charges should be dismissed in their entirety, absent withdrawal.

B.J.K.

[1] The commercial contract between Maersk and Holt specifies that Holt will perform M&R work on containers "owned, operated, or controlled by MAERSK LINE ...."

[2] Machinists Local 724 (Holt Cargo Systems), 307 NLRB 1394 (1992). The Board had previously awarded M&R work to the IAM when Holt operated out of its Gloucester City facility. Teamsters Local 158 (Holt Cargo), 293 NLRB 917 (1989).

[3] 309 NLRB 1283 (1992).

[4] Holt contends that an ILA Local 1291 official specifically stated that the Union wanted the actual assignment of work rather than in-lieu-of pay.

[5] See, e.g., Longshoremen Local 1291 (Holt Cargo Systems), 309 NLRB 1283, 1284-85 (1992).

[6] IUOE Local 3 (Long Elevator), 289 NLRB 1095 (1988), enf'd 902 F.2d 1297 (8th Cir. 1990) (Section 8(b)(4)(A)).

[7] 473 U.S. 61, 76 (1985), citing NLRB v. Enterprise Assn. of Pipefitters, Local No. 638, 429 U.S. 507 (1977); National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967). See also NLRB v. International Longshoremen's Association (ILA I), 447 U.S. 490, 504-05 (l980).

[8] ILA I, 447 U.S. at 510.

[9] National Woodwork, 386 U.S. at 644-45, where the Supreme Court noted, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."

[10] ILA II, 473 U.S. at 76 n.16, quoting Pipefitters, 429 U.S. at 510.

[11] ILA II, 473 U.S. at 74 n.12. See also International Longshoremen's Association, 266 NLRB 230, 234, 260-61 (1983).

[12] ILA v. NLRB, 613 F.2d 890, 912-13 (1979), aff'd in ILA I, above.

[13] See similarly Teamsters Local 25 (Boston Deliveries), 282 NLRB 910, 913 (1987), enf'd 831 F.2d 1149 (1st Cir. 1987), where the Board held that the union's grievance against Boston Deliveries to reclaim lost unit work after Sears canceled a subcontracting arrangement was secondary inasmuch as Sears alone had control over the subcontracting decision.

[14] ILA v. NLRB, 613 F.2d at 913.

[15] 309 NLRB at 1285-86.

[16] 447 U.S. at 507.

[17] Ibid (emphasis supplied).

[18] See, e.g., Heavy, Highway, Building & Construction Teamsters Committee (California Dump Truck Owners Association), 227 NLRB 269, 274 (1976) (pursuit of grievance raising colorable contract claim not 8(b)(4)(ii) coercion or subsection (A) unlawful object); Los Angeles BCTC (Noble Electric), 217 NLRB 946, 948-49 (1975) (enforcement through judicial means of lawful no-subcontracting clause protected under construction industry proviso, not Section 8(b)(4)(ii) coercion); Sheet Metal Workers Local 49 (Los Alamos Constructors), 206 NLRB 473, 476-77 (1973) (seeking of an arbitral and judicial remedy without resort to self-help, not (ii) restraint or coercion). See also General Teamsters Local 483 (Ida Cal Freight Lines), 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union merely grieved and sought to compel arbitration through a Section 301 action over "reasonable" position that owner-operators were covered by the labor agreement).

[19] NABET (Metromedia, Inc.), 255 NLRB 372, 374 (1981), rev. dismissed as moot 110 LRRM 2167 (9th Cir. 1982).

[20] 291 NLRB 89, 93 (1988), rev. den. 892 F.2d 130 (D.C. Cir. 1989).

[21] 461 U.S. 731, 745 n.11 (1983).

[22] Id. at 737 n.5.

[23] 289 NLRB at 1095.

[24] Mine Workers (Bronzite Mining), 280 NLRB 587, 590 (1986) (Section 10(k) determination proper where dispute was between competing groups of employer's employees rather than between union and employer over interpretation of contract).

[25] See Teamsters Local 578 (USCP-Wesco), 280 NLRB 818 (1985), aff'd 827 F.2d 581 (9th Cir. 1987). See also ILWU Local 8 (Waterway Terminals Co.), 185 NLRB 186 (1970), vacated and remanded 467 F.2d 1011 (9th Cir. 1972), on remand 203 NLRB 861 (1973); and Safeway Stores, 134 NLRB 1320 (1961).

[26] Wesco, 280 NLRB at 821.

[27] Id. at 820.

[28] In so concluding, we need not rely on the Board's recent decision in Laborers (Capital Drilling Supplies), 318 NLRB 809 (1995). There, the Board held that an arguably meritorious grievance against a general contractor in the construction industry alleging that unit work had been contracted out in breach of a lawful union signatory clause did not constitute a "claim" to the work within the meaning of Sections 8(b)(4)(D) and 10(k). In so concluding, the Board explicitly adopted former Chairman Stephens' dissent in Laborers Local 731 (Slattery Associates), 298 NLRB 787 (1990). Stephens noted therein that, "the contracting out of work that is simply of the same *type* as that covered by a union signatory clause," as in Slattery and Capital Drilling, is distinguishable from Wesco, "a 'true work preservation case' in which employees were protesting (through a contract grievance) the removal of work they had actually been performing for the employer when the employer contracted it out." Slattery Associates, 298 NLRB at 792 n.5 (Stephens, dissenting). Here, the ILA grieved the loss of work their members had actually performed in the recent past, rather than the prospective diminution of work opportunities to come. Accordingly, in reliance on Wesco, we do not need to determine the extent to which Capital Drilling applies to cases such as the instant matter which concern the actual loss of unit work.